

Message

From: Jenkins, Brandi [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=9B3EA7AACD1A44C0AB3EE9A8F0A2EA3F-JENKINS, BRANDI]
Sent: 9/14/2017 10:47:00 AM
To: Walker, Mary [walker.mary@epa.gov]
Subject: RE: Florida 404 Assumption

Thanks Mary.

Trey is going to be in listening mode so no need to listen in although we may give you a call in the car on the way over to FDEP. Possibly @ 9:30.

Brandi

From: Walker, Mary
Sent: Thursday, September 14, 2017 6:25 AM
To: Jenkins, Brandi <Jenkins.Brandi@epa.gov>
Subject: Fwd: Florida 404 Assumption

Nothing new to report from program on 404. Right now we are still on go to send the team down on 9/25 if they still want that.

Sent from my iPhone

Begin forwarded message:

From: "Mcgill, Thomas" <Mcgill.Thomas@epa.gov>
Date: September 13, 2017 at 9:55:17 PM EDT
To: "Walker, Mary" <walker.mary@epa.gov>
Subject: Re: Florida 404 Assumption

Correct, no substantive developments. I sent Justin and Megan an email earlier today indicating we were prepared to either meet the week of September 25 as previously scheduled or can postpone based on whatever works best for them.

Sent from my iPhone

On Sep 13, 2017, at 7:51 PM, Walker, Mary <walker.mary@epa.gov> wrote:

Just FYI. If there have been any developments let me know. But I let them know I don't think anything substantive has happened since the briefing last week except the hurricane - which I am sure reply complicates their timeline.

Sent from my iPhone

Begin forwarded message:

From: "Jenkins, Brandi" <Jenkins.Brandi@epa.gov>
Date: September 13, 2017 at 6:47:15 PM EDT
To: "Walker, Mary" <walker.mary@epa.gov>, "Zapata, Cesar" <Zapata.Cesar@epa.gov>
Cc: "Heard, Anne" <Heard.Anne@epa.gov>, "Ghosh, Mita"

<Ghosh.Mita@epa.gov>, "Jones-Johnson, Shea" <Jones-Johnson.Shea@epa.gov>

Subject: Florida 404 Assumption

Mary,

Secretary Valenstein has asked for Trey to meet with some of his staff tomorrow (possibly John Truitt) to discuss the CWA 404 Assumption. Is this the latest information? I pulled this from the Florida Bi-Monthly call. Did something recently happen that they would want to loop in Trey? Or are they waiting on something from us?

Thanks - Brandi

Florida's Exploration of Clean Water Act §404 Assumption

ISSUE: Florida's Exploration of 404 Assumption

The Florida Department of Environmental Protection has notified EPA staff that it is exploring assumption of the CWA §404 program, with a tentative goal of assuming the program by the end of 2018. EPA staff are engaging FDEP staff and are committed to provide any needed assistance and support to FDEP.

BACKGROUND:

CWA §404(g) authorizes States, with the approval from the EPA, to assume the authority to administer the Section 404 permit and enforcement program in some, but not all, navigable waters and adjacent wetlands.

In order to receive EPA approval to assume the program, a State program must:

- Be consistent with and no less stringent than Section 404 and implementing regulations;
- Have equivalent scope of jurisdiction;
- Regulate at least the same activities;
- Provide for sufficient public notice and allow public participation;
- Ensure compliance with CWA Section 404(b)(1) Guidelines;
- Ensure adequate enforcement authority;
- Submit certification from their Attorney General that the State laws provide adequate authority to carry out the described program.
- Have a Memorandum of Agreement (MOA) in place with the Corps of Engineers, which among other things describes which waters are assumable;
- Have a MOA in place with the EPA that among other things describes EPA's oversight.

The approval decision for assumption is made by the RA, with concurrence from the Office of Water, the Office of Enforcement and Compliance and the Office of General Counsel.

In 1993 FDEP had seriously considered assumption.

- An action taken by the State legislature regarding the scope of jurisdiction of wetlands prevented the State from having a package that could be approved by the EPA.

The Assumable Waters Subcommittee, comprised of 22 states and the Corps of Engineers and convened under the National Advisory Council for Environmental Policy and Technology and issued a report in May 2017.

- Report included recommendations by the majority (except the Corps) that EPA clarify, through rulemaking or guidance, which waters a state assumes permitting responsibility for under an approved section 404 program.
- The EPA has not yet acted upon these recommendations.

To date, New Jersey and Michigan are the only States that have assumed the 404 program.

- Typically, the exploration of assumption by a State takes several years.
- Many states use a State Programmatic General Permit in lieu of assumption.

STATUS:

FDEP has informally engaged EPA regarding its interest in assumption including during the June 2017 EPA-State Commissioners meeting, a meeting with Ken Wagener on 7/13/2017 and during teleconferences with Region 4 staff during August 2017.

- FDEP has not yet announced to the public that it is seeking assumption.
- FDEP stated that their goal is to assume the program by the end of Governor Scott's term (i.e., by the end of 2018).
- FDEP relayed that Ken Wagener offered that EPA could use a "SWAT Team" to assist with their efforts.
- EPA staff answered questions and offered to provide any needed assistance during the teleconferences. EPA also shared a regulatory cross-walk for FDEP to use as a tool for identifying which state statutes may require changes to meet assumption requirements.
- Region 4 staff remain prepared to provide any assistance needed by FDEP.

Staff with the Jacksonville District of the Corps of Engineers have shared with Region 4 staff the status of their discussions with FDEP.

- Colonel Kirk has directed staff to work with FDEP regarding what support the State may need in their effort to develop an assumption package.
- The Corps is in the process of delineating waters that it believes are not assumable (e.g., waters subject to Section 10 of the Rivers and Harbors Act, other Traditional Navigable Waters). This process is not expected to be complete until sometime during 2018.

Region 4 and Office of Water staff briefed senior management with OW, OGC, and OECA on 8/25/2017 and provided an overview of the 404 assumption process and requirements and the status of Florida's exploration of assumption.

NEXT STEPS:

Region 4 and Office of Water staff are tentatively planning a trip to Tallahassee to meet with FDEP staff in September to discuss the assumption requirements and the most productive way to proceed.

CONTACTS:

Tom McGill, Water Protection Division, EPA Region 4 (404-562-9243)

Phil Mancusi-Ungaro, Office of Regional Counsel, EPA Region 4 (404-562-9519)

Kathy Hurl, Office of Water, EPA HQ (202-566-1269)